Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE CITY OF FLINT, MICHIGAN, *Petitioner,*

v.

CHARLES MIDDLETON; W. OSMUND KELLY, III; BRIAN SEPANAK; BRUCE SEPANAK; STEPHEN HILL; GREGORY DOERR; BARRY SAUNDERS; ROBERT LOREY; MAYNARD NEWMAN; JAMES MCLELLAN; THOMAS HILGENDORF, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Whether a municipality can, consistent with the Fourteenth Amendment, adopt a voluntary affirmative action program where there had been prior judicial findings of race discrimination, unsuccessful efforts to remedy the discrimination through alternative means, and where the municipality has conducted hearings and made findings that the effects of prior racial discrimination would continue absent the adoption of an affirmative action plan.

2. Whether in reviewing the City of Flint's Affirmative Action Plan, the United States Court of Appeals for the Sixth Circuit, improperly applied a strict scrutiny standard at a heightened level which was fatal in fact.

3. Whether the United States Court of Appeals for the Sixth Circuit improperly shifted the burden of proof to the City to prove that its affirmative action plan was constitutional even after the City established a strong basis in evidence justifying the adoption of the Plan.

4. Whether the United States Court of Appeals for the Sixth Circuit erred in determining that the relevant statistical pool for sergeants was the population of entry level police officers, even though prior discrimination had adversely affected the number of minorities at the rank of police officer.

5. Whether, the United States Court of Appeals for the Sixth Circuit erred in holding that a gross statistical disparity in the relevant statistical pool could not justify the adoption of affirmative action plan.

6. Whether in reviewing a district court's grant of summary judgment in favor of the City of Flint, the United States Court of Appeals for the Sixth Circuit could disregard the standard of review and effectively grant summary judgment in favor of the

Plaintiffs in the absence of any cross motion or request for such relief.

7. Whether it was manifestly unjust for the United States Court of Appeals for the Sixth Circuit to retroactively apply a heightened level of strict scrutiny to an affirmative action plan that was adopted consistent with precedent which was controlling at the time of adoption.

8. Whether it was manifestly unjust for the United States Court of Appeals for the Sixth Circuit to expose the city to potential retrospective relief by its retroactive misapplication of a impermissibly heightened standard of scrutiny to an affirmative action plan modelled upon a plan approved by the Sixth Circuit immediately before its adoption and recently terminated by the Sixth Circuit without invalidation of the Plan.

LIST OF PARTIES

The City of Flint was a Defendant in the United States District Court for the Eastern District of Michigan and Appellee before the United States Court of Appeals for the Sixth Circuit. The City of Flint is a municipal corporation organized under the laws of the State of Michigan and has no parent or subsidiary corporations.

The Flint Police Officers Association was added as a necessary Defendant in the United States District Court for the Eastern District of Michigan because the outcome of the action could affect contractual rights between the City and the Flint Police Officers Association.

The following were Plaintiffs in the United States District Court for the Eastern District of Michigan and Appellants before the United States Court of Appeals for the Sixth Circuit: Charles Middleton; W. Osmund Kelly, III; Brian Sepanak; Bruce Sepanak; Stephen Hill; Gregory Doerr; Barry Saunders; Robert Lorey; Maynard Newman; James McLellan; and Thomas Hilgendorf. In addition, Mark Campbell, who was a Plaintiff in the United States District Court for the Eastern District of Michigan, dismissed his claims by Stipulation on June 7, 1991.

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Review is sought of the opinion of the Sixth Circuit Court of Appeals, dated August 6, 1996, *Middleton, et. al. v. City of Flint, et. al.*, 92 F.3d 396 (6th Cir. 1996), appearing at App. 1a to App. 38a of the Appendix. The Memorandum Opinion and Order of the District Court, dated January 7, 1993, *Middleton, et. al. v. City of Flint, et. al.*, 810 F. Supp. 874 (E.D. Mich. 1993), appears at App. 39a to App. 57a. The Memorandum and Opinion of the District Court dated July 29, 1992 appears at App. 58a to App. 71a. The Order Denying Defendant-Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc, dated October 28, 1996, appears at App. 72a.

JURISDICTION

Petitioner seeks review of the opinion issued by the Sixth Circuit which reversed the District Court's grant of summary judgment in favor of the City and declared the City's Affirmative Action Plan unconstitutional as a matter of law and affirming denial of the City's motion on, *inter alia,* statute of limitations grounds. The Supreme Court has jurisdiction to review this opinion pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fourteenth Amendment of the United States Constitution, 42 U.S.C. § 1981 and 42 U.S.C. § 1983, appearing at App. 73a, App. 74a and App. 75a, respectively.

STATEMENT OF THE CASE

On May 16, 1990, Plaintiffs, who are white, filed this action challenging the City of Flint's promotions in the Police Department from the rank of police officer to the rank of sergeant under a voluntary Affirmative Action Plan (the Plan) as a violation of

the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.[1]

The City filed two Motions for Summary Judgment, one with respect to the equal protection challenge on May 19, 1992, and one on limitations and other grounds on October 10, 1991. No cross motion or request for summary judgment was ever filed by Plaintiffs. On July 29, 1992, the first motion was denied with respect to the statute of limitations issue. On January 7, 1993, the District Court granted the City's Motion for Summary Judgment finding that there was no genuine issue of material fact as to whether the City had a compelling interest to justify the adoption of the Plan and whether the Plan was narrowly tailored.

Plaintiffs filed a Notice of Appeal with the Sixth Circuit Court of Appeals dated February 2, 1993. The City filed a Cross-Appeal on February 16, 1993. The Sixth Circuit issued its opinion on August 6, 1996, which reversed the District Court's grant of summary judgment. The Sixth Circuit inexplicably went further and declared the Plan unconstitutional as a matter of law. The Court then remanded the case for further proceedings on issues relating to damages. The City filed its Petition for Rehearing on August 20, 1996. This Petition for Writ of Certiorari is timely because it is brought within ninety days of the Sixth Circuit's October 28, 1996 order denying the City's Petition for Rehearing.

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[1] Two other counts of Plaintiffs' Complaint alleged that the Plan violated 42 U.S.C. §1981 and the Michigan Elliott-Larsen Civil Rights Act, M.C.L. § 37.2101, et. seq. The City's motions to dismiss and for summary judgment were denied with respect to the §1981 claim and granted with respect to the state law claim. The Sixth Circuit did not address the former issue, but affirmed the dismissal of the state law claim.

STATEMENT OF FACTS

The Plan, which provided for 1:1 promotions of police officers to the rank of sergeant, was adopted by the City in late 1984. Beginning in April 1983, the Flint City Council conducted a series of special meetings to investigate the need for affirmative action in the City, including the impact of the sergeants promotional exam on minorities. The City Council directed that a Task Force comprised of representatives of the City and the Flint Police Officers Association (FPOA) be established. Following the Task Force's recommendations in October 1983, negotiations proceeded between the City and the FPOA. These negotiations produced agreement on a proposed Addendum to the parties' collective bargaining agreement which gave the City the right, should the City find it appropriate, to maintain two separate lists made up of minority and non-minority police officers who had passed the promotional examination and to promote on the basis of a ratio not to exceed one eligible minority for every eligible non-minority. App. 76a. In order to minimize the impact on non-minorities, the Addendum also included an increase in the number of sergeant positions and a significant pay increase for officers. App. 231a.

In April 1984, after the Addendum was ratified by both the City Council and members of the FPOA, the Flint Human Relations Commission (HRC) held public hearings on the need for affirmative action within the Flint Police Department. Based on the testimony and reports received, the HRC issued its Report in August 1984.

Throughout the hearings, the HRC was presented with testimony from numerous witnesses regarding racially discriminatory practices within the City's Police Department, including Flint Police Chief Miles White and labor market economist Marc Bendick, Jr., Ph.D. App. 81a and App. 120a. Chief White presented statistical evidence relating to both entry level hiring and promotions of minorities in the Police Department and

testified that while there were increases in the percentage of minorities hired and promoted during the period of active litigation in the 1970's, those percentages were not sustained. With respect to promotions specifically, Chief White testified that no minorities had ever been promoted above the entry level police officer position prior to September 1974. App. 85a. There had been some minorities promoted to sergeant under a 1974 agreement reached in the case of *Flint Police Patrolmen's Association (FPPA) v. City of Flint*, (Genesee County) no. 74-33234-CL. App. 181a. That agreement provided for the promotion of minorities on a 1:4 ratio for a period of five years or until minorities represented 15% of sergeants. *Id.* However, Chief White testified that the 1:4 agreement expired without minorities ever attaining 15% of sergeants. App. 85a. The promotion statistics he offered also showed that of the fifteen promotions to sergeant between 1977 and 1982, none were minorities. He testified that if no remedial action was taken, the next twenty-one promotions to sergeant from the existing list would all be white officers. Chief White also explained that the operational needs of the Department would be furthered by increasing the number of minority officers and sergeants.

City Council President Melvin McCree also testified that the City Council's investigations in 1981 and 1983 showed that there was a dramatic underrepresentation of minorities in all ranks of the Police Department. App. 98a. The testimony of Chief White and Melvin McCree was uncontradicted before the HRC.

Dr. Bendick conducted an in-depth analysis of the Police Department's hiring and promotional practices. Dr. Bendick concluded that the Police Department's personnel practices had discriminated against minorities at both the entry level police officer position and the promotional level of sergeant. App. 120a. Dr. Bendick's conclusion regarding entry level discrimination was based on a comparison of the qualified minority labor pool with the percentage of minority police officers. His conclusion about

promotions was based upon the comparison of the percentage of minority sergeants with the percentage of minorities that would have been on the police force absent discrimination in hiring or promotion. The disparity between the actual percentage of minority sergeants and the expected number of minority sergeants absent prior discrimination in the Police Department was 10.1% vs. 31.1%. Dr. Bendick's testimony was also uncontradicted before the HRC.

The HRC also reviewed judicial findings of race discrimination against the City's Police Department in several prior lawsuits. Most notably, *Alfaro et. al. v. Suber, et. al.,* Civil Action no. 613, May 18, 1977 (E.D. Mich. 1977) (unpublished), was filed in 1973 by minority officers challenging the hiring and promotion practices of the Police Department and the police officers' union. App. 187a. After a bench trial, the District Court in *Alfaro* found compelling evidence of discriminatory hiring practices in the Police Department.[3] Relying on the improvements undertaken by the City in the preceding three and one-half years, the Court declined to impose a hiring quota at that time.

The HRC also examined the case of *Waldron v. Flint Police Patrolmen's Association,* no. 75-40084 (E.D. Mich. 1980) (unpublished). In *Waldron,* the U.S. District Court upheld the agreement reached in *FPPA v. City of Flint* to promote minorities to sergeant on a 1:4 basis against an equal protection challenge by white officers. App. 167a.

Finding that the statistical and anecdotal evidence of discrimination against minorities established a broad pattern of prior discrimination in the Police Department, the HRC concluded that while other efforts should be continued, a promotional ratio

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[3] The District Court in *Alfaro* reviewed and considered the findings in *Holliman v. Price,* 9 FEP Cases (BNA) 1363, 1372 (1973), and the earlier agreement reached in *FPPA v. City of Flint,* which provided for the promotion of minority officers on a 1:4 basis for a five-year period.

was needed to remedy the effects of past and present discrimination against minorities in a timely fashion. The HRC concluded that such remedial action would not unnecessarily trammel the interests of non-minority police officers.

The Plan was presented to and approved by the Michigan Civil Rights Commission and the collective bargaining agreement was amended to incorporate the Plan.[4]

At the time it adopted the Plan, the City was fully cognizant of the Sixth Circuit's decision upholding an almost identical voluntary 1:1 dual-list promotional affirmative action plan adopted in 1974 by its neighbor the City of Detroit in its police department. *Bratton v. City of Detroit,* 704 F.2d 878, *modified* 712 F.2d 222 (6th Cir. 1983), *cert. den.* 464 U.S. 1040 (1984). In *Bratton,* the Sixth Circuit held that Detroit's affirmative action plan was a valid and permissible remedy for the clearly identifiable past discriminatory practices. As the City was also aware, the Sixth Circuit had approved Detroit's promotion plan for officers to sergeants. *DPOA v. Young,* 608 F.2d 671 (6th Cir. 1979), *cert. den.* 452 U.S. 938 (1981).

While the Plan was adopted in 1984, Plaintiffs did not file their action until May 1990, more than five years later. At that time, the Plan had also withstood an equal protection challenge by female officers in *Barcume, et al. v. City of Flint,* no. 84-8066 (E.D. Mich. 1986) (Opinion and Order of July 15, 1986). The City prevailed on its summary judgment motion in this case in January 1993 and it was not until August 1996 that the Sixth Circuit not only reversed the decision, but invalidated the Plan. Thus, the City was deprived of even the opportunity to meet the

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[4] Under the Michigan Elliott-Larsen Civil Rights Act, M.C.L. § 37.2101, *et. seq.,* an employer can submit and obtain approval for an affirmative action plan from the Michigan Civil Rights Commission, an agency created by the Michigan Constitution. An employer's actions taken pursuant to an approved plan are immune from liability for claims brought under the Elliott-Larsen Civil Rights Act.

increased level of scrutiny demanded by the Sixth Circuit's review.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S APPLICATION OF THE STRICT SCRUTINY STANDARD WAS FATAL IN FACT.

Allowing the Sixth Circuit's decision to stand effectively precludes any municipality from adopting or maintaining a voluntary affirmative action plan to eradicate the effects of prior racial discrimination. The Sixth Circuit's "fatal-in-fact" level of scrutiny is most notably demonstrated by: (1) an insistence that there be a nearly complete exclusion of minorities in order to find a compelling governmental interest; (2) a determination that if prior courts had declined to order a promotional quota none could be justified; and (3) a conclusion that a promotional remedy has a severe impact on third parties as a matter of law. Apparently reflecting the tide of public antagonism toward affirmative action, the Sixth Circuit altered the constitutional standard of review such that no municipality can adopt or maintain a voluntary affirmative action plan to remedy the effects of past, invidious racial discrimination.

The Sixth Circuit's approach stands in stark contrast to this Court's recent admonition in *Adarand Constructors, Inc. v. Pena,* 115 S. Ct. 2097, 2117 (1995):[5]

> Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' *Fullilove, supra,* at 519, 100 S. Ct., at 2795 (Marshall, J., concurring in judgment). **The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality,**

[5] This holding is noted in *US v. Virginia,* 116 S. Ct. 2264, n. 6 (1996) (Ginsberg, J.).

> **and government is not disqualified from acting in response to it.** (emphasis added).

Also see *Id.*, at 2135 (Ginsberg, J. dissenting).[6]

In this case, the City of Flint stepped up to meet its obligation to eradicate the present effects of past racial discrimination in the Police Department. The City was faced with undisputed anecdotal and statistical evidence of racial discrimination in the Police Department, prior judicial findings that artificial barriers to hiring operated to exclude minorities from police ranks, and a history of persistent failure of alternatives aimed at rectifying identifiable discriminatory practices. The City found that, notwithstanding changes made since the first promotion of a black officer in 1974, significant effects of prior discrimination persisted in the Police Department, particularly at the rank of sergeant. As this Court has held, the government "unquestionably has a compelling interest in remedying past and present discrimination by a state actor." *United States v. Paradise,* 480 U.S. 149, 167 (1987).

In its opinion, the Sixth Circuit employed a higher level of strict scrutiny which no affirmative action plan could withstand, and which this Court has never endorsed. This overly harsh approach is reflected by three fundamental departures from this Court's precedent.

First, the Sixth Circuit ruled that the evidence must show that there continues to be a nearly complete exclusion of minorities in order to justify affirmative action. The Court incorrectly transposed a requirement that the prior discrimination sought to be remedied by the Plan be of the kind of "pervasive, systematic, and obstinate discriminatory conduct" that existed in

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[6] Justice Kennedy, concurring in *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989), suggested that not only is there authority to act to eradicate the effects of racial discrimination, but "an absolute duty to do so where those wrongs were caused intentionally by the State itself."

the Alabama Department of Public Safety in the case of *United States v. Paradise,* 480 U.S. 149 (1987) (plurality opinion). App. 15a-16a. In *Paradise,* twelve years after the District Court condemned the Department's racially discriminatory policies, there were virtually no blacks in the ranks above corporal and there were no acceptable procedures for the promotional advancement of blacks. *Id.,* at 162-163. Concluding that the "fact pattern in *Paradise* does not prevail in this case," the Sixth Circuit ruled that the evidence of past discrimination in this case was not sufficiently "egregious" to justify Flint's 1:1 promotional plan. App. 15a-16a. While there is significant evidence in this case parallel to that presented in *Paradise* (e.g., total exclusion of minorities from the rank of sergeant until 1974 and severe underrepresentation of minorities in all levels of the Police Department), this Court's decision in *Paradise* in no way required that there be continuing discrimination of the severity present in the Alabama department in order to justify remedial action.

Second, the Sixth Circuit incorrectly concluded that because the district courts in *Holliman* and *Alfaro* did not order a 1:1 promotional remedy, such a plan could not be justified as a necessary remedy in 1984 as a matter of law. Neither this Court nor any other circuit court has held that a prior judicially ordered remedy is a prerequisite to the adoption of a voluntary affirmative action plan. In fact, this Court has specifically held that a judicial finding of discrimination is not a necessary prerequisite to the adoption of an affirmative action plan. *Wygant v. Jackson Bd of Educ.,* 476 U.S. 267, 278, *reh. den.* 488 U.S. 1014 (1986) (plurality).

In rejecting the promotional remedy adopted by the City, the Sixth Circuit emphasized the alternative steps initiated after the *Holliman and Alfaro* decisions.[7] However, the Sixth Circuit

[7] The Sixth Circuit characterized the "invitation" to the federal courts to order hiring and promotional quotas as something ongoing over a twenty-year

disregarded the fact that less drastic alternative steps and the prior promotional plan failed to eradicate the effects of the City's own past discrimination.[8] The uncontroverted evidence was that the alternative steps fell far short of remedying the effects of the judicially-recognized race discrimination. Contrary to the Sixth Circuit's reasoning, this Court has held that, having undertaken less drastic and racially-neutral alternatives, the City was not required to exhaust all possible remedies before undertaking affirmative action. *Croson,* 488 U.S. at 507. Also see *Peightal v. Metropolitan Dade County,* 26 F.3d 1545, 1557 (11th Cir. 1994).

Third, the Sixth Circuit's conclusion that the impact of the promotional remedy on non-minorities was severe as a matter of law, is inconsistent with this Court's holdings. This conclusion was reached without regard for the evidence that the City sought to reduce the impact on non-minorities by increasing the number of sergeant positions and significantly increasing the compensation to officers. App. 231a. The City continued to promote white officers on a 1:1 basis under the Plan.

The Plurality in *Paradise* noted that this Court has not required that all remedial plans be limited to the least intrusive means. *Paradise*, 480 U.S. at 184. Also see *Fullilove v. Klutznick,* 448 U.S. 448, 484 (1980) ("No constitutional defect necessarily arises from the disappointment of non-minorities asked to share the burden in curing the effects of prior discrimination.") The Court in *Wygant* specifically recognized that:

> . . . in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As

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period. This is a misstatement of fact, as the federal courts were only so "invited" during the 1970's.

[8] Chief White testified that the 1:4 promotional plan expired without ever having attained the 15% goal. App. 85a. The fact remains that at the time the Plan was adopted, only 10.1% of sergeants and only 19.8% of officers were minorities.

> part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy.

Wygant, 476 U.S. at 280-281. In *Wygant* and *Paradise* this Court distinguished the heavy burden imposed by layoff or discharge and the less intrusive burden of denial of a future opportunity, noting that "postponement imposes a lesser burden still." *Paradise*, 480 U.S. at 183. At issue in this case is the less intrusive burden of delay or denial of promotion to sergeant.

For the reasons discussed above, the scrutiny with which the Sixth Circuit examined the Plan in this case was contrary to this Court's decisions and was so strict as to make the standard "fatal in fact" for all affirmative action plans.

II. THE SIXTH CIRCUIT IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE CITY TO PROVE THAT ITS AFFIRMATIVE ACTION PLAN WAS CONSTITUTIONAL.

Consistent with this Court's precedent, the District Court granted summary judgment to the City because the evidence it presented established an unrebutted inference of discrimination sufficient to justify the implementation of the affirmative action plan. The Sixth Circuit, however, improperly shifted the burden to the City to prove that it had a compelling interest, rather than assessing whether the City had established an inference of discrimination.[9] As a result of this flawed analysis, the Plaintiffs were never required to rebut the evidence presented by the City and to prove that the Plan was unconstitutional.

When a race-based affirmative action plan is analyzed even under strict scrutiny, the party defending the plan bears the

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[9] The Sixth Circuit stated "[w]e hold that the City has not met its heavy burden of proving that a compelling state interest necessitates its racial quota system, nor has it shown that the quota system is narrowly tailored to serve such an interest." App. 2a.

burden of producing evidence that the plan is constitutional. However, the party challenging the plan retains at all times, the burden of proving that the plan is unconstitutional. *Wygant,* 476 U.S. at 277-278.

In *Johnson v. Transportation Agency, Santa Clara County,* 480 U.S. 616, 626 (1987) (citing to *Wygant),* this Court reaffirmed that the party challenging the affirmative action plan bears the burden of establishing the invalidity of the plan. The Sixth Circuit ignored this analytical framework in the present case.

As *Croson* teaches by majority opinion, if the party defending the plan produces evidence "approaching a *prima facie* case of discrimination," that party has satisfied its burden to establish a "strong basis in evidence" for remedial action. *Croson,* 488 U.S. at 500. In order to establish a *prima facie* case of discrimination, a municipality need only produce enough evidence from which a rational trier of fact could conclude the presence of discrimination. Once a municipality produces evidence upon which an inference of discrimination can reasonably be drawn, it establishes a strong basis in evidence for remedial action which must be rebutted by the plaintiffs with a showing that the evidence could not reasonably be supported by such an inference. See *Croson,* 488 U.S. at 509; *see also, Wygant,* 476 U.S. at 293.[10] If two competing inferences arise, an issue of fact remains and summary judgment is inappropriate (unlike here, where the Sixth Circuit

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[10] The Sixth Circuit's opinion directly conflicts with decisions of other circuits which have faithfully applied this proper burden of proof. See *Stuart v. Roache,* 951 F.2d 446 (1st Cir. 1991) (Breyer, J.), *cert. den.* 504 U.S. 913 (1992); *Concrete Works of Colorado v. City and County of Denver,* 36 F.3d 1513, 1522 (10th Cir. 1994), *reh. den., cert. den.,* 115 S. Ct. 1315 (1995). In fact, the decision below is even inconsistent with the Sixth Circuit's decision in *Aiken v. City of Memphis,* 37 F.3d 1155 (6th Cir. 1994) (en banc) (the party challenging the plan bears the ultimate burden of proving its unconstitutionality). (The City sent a Supplemental Citation of Authorities to the Sixth Circuit regarding *Aiken* after oral argument and before the decision.)

effectively granted summary judgment to Plaintiffs without the necessity of a cross motion).

Establishing a "strong basis in evidence" does not mean proving actual discrimination.

> . . . a challenge to an affirmative action plan does not automatically impose upon the public employer the burden of convincing the court of its liability for prior unlawful discrimination; nor does it mean that the court must make an actual finding of prior discrimination based on the employer's proof before the employer's affirmative action plan will be upheld.

Johnson 480 U.S. at 1463 (O'Connor, J. concurring). *See also, Wygant*, 476 U.S. at 292 (O'Connor, J. concurring). The Sixth Circuit erred in shifting to the City a "heavy burden" of proving the Plan was constitutional.

III. THE SIXTH CIRCUIT COMPLETELY DEPARTED FROM SUPREME COURT PRECEDENT IN REJECTING THE CITY'S STATISTICAL EVIDENCE.

A. The Sixth Circuit Ignored *Paradise*.

The Sixth Circuit improperly held:

> There is only one population group that is eligible for promotion to the rank of Flint police sergeant. That relevant statistical pool is the population of previously hired Flint police officers.

App. 25a. This Court specifically held in *Paradise* that the pool of previously hired officers was not the relevant statistical pool because "[d]iscrimination at the entry level necessarily precluded blacks from competing for promotions and resulted in a

departmental hierarchy dominated exclusively by nonminorities." *Paradise*, 480 U.S. at 168.[11]

Following *Paradise*, the District Court held that Dr. Bendick's statistical analysis was in complete compliance with Supreme Court precedent:

> Plaintiff's expert suggests that the City's expert chose an incorrect figure by considering the effect of discrimination at the entry level as influencing the discrimination at the promotional level. However, the Supreme Court has specifically determined that the city's approach is proper.

App. at 51a. In conducting his study, Dr. Bendick first used the qualified labor pool to determine how many police officers would have been minority absent discrimination in hiring at the entry level.[12] Next, Dr. Bendick used that figure to determine how many minorities would have been expected to be sergeants absent discrimination at the entry level. Finally, Dr. Bendick compared this figure to the actual number of minority sergeants on the force, at the time the Plan was adopted. Based on this analysis, Dr. Benedick concluded that absent the discriminatory hiring practices, 31.1% of the sergeants would have been minorities while the actual number of minority sergeants on the force only amounted to a mere 10.1%. By disregarding the fact that discrimination at the entry level impacts the promotional level, the Sixth

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[11] Other Circuits have faithfully followed this Court's holding in *Paradise*. Writing then for the First Circuit, Justice Breyer, stated: "[o]bviously, if few blacks become police officers, few blacks will become sergeants." *Stuart*, 951 F.2d at 452. Also see *Forehand v. Florida State Hosp. At Chattahoochee*, 89 F.3d 1562, 1574 (11th Cir. 1996).

[12] Plaintiffs never disputed that discrimination was present in the City's hiring practices for police officers. In fact, Plaintiffs' expert Harry Frank, Ph.D. admitted in his deposition that he did not even analyze whether the pool of police officers had been affected by past discrimination. App. 214a.

Circuit further illustrates its fatal-in-fact application of strict scrutiny.

B. The Sixth Circuit Erroneously Concluded That The City's Statistics Were Based Upon The General Population.

The Sixth Circuit's holding that the City lacked a compelling interest to implement an affirmative action plan is based upon the erroneous conclusion that Dr. Bendick used the wrong labor pool in his statistical analysis.

This Court has held that in order to determine the adequacy of the statistical evidence presented to justify the implementation of an affirmative action plan, one must first look to the basic qualifications required for the position at issue. These qualifications determine what the relevant statistical pool is for the purpose of comparison to the percentages of minorities selected for the position at issue. *Croson*, 488 U.S. at 501-502.[13]

Dr. Bendick's conclusion as to the number of minorities who would have been hired into the department absent discrimination was based upon those **qualified** to be hired into the department as police officers: that is, persons of the required age, who possessed a high school diploma and who were actively seeking employment.[14] In spite of the fact that Dr. Bendick based his statistical

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[13] The *Croson* court held that for certain entry level positions or positions requiring minimal training, statistical comparisons using the general population may be probative of a pattern of discrimination. *See also, Johnson*, 480 U.S. at 631-632; *Teamsters v. United States*, 431 U.S. 324 (1977); and *Steelworkers v. Weber*, 443 U.S. 193 (1979). Since the position of a police officer is an entry level position, Dr. Bendick could have relied upon general population statistics.

[14] Dr. Bendick even further limited the qualified labor pool to account for the City's tendency to hire some of its officers from nearby communities where minorities comprise a smaller proportion of the labor force and he modified the projections to reflect the census-taker's tendencies to undercount minorities and for the propensity of minorities to apply for civil service jobs at a higher rate than for jobs in the private sector. App. 122a-124a and 138a-139a.

analysis on the qualified labor pool, the Sixth Circuit throughout its opinion, repeatedly mischaracterized Dr. Bendick's analysis as being based on the "general labor pool," "general workforce" or "regional labor pool." App. 21a, 23a, 38a. In fact, the Sixth Circuit disregarded the District Court's explicit finding on this point:

> Plaintiff's charge that the City's expert and the City relied upon general population statistics in establishing the plan. A review of the HRC report and the city expert's report from 1984 shows this plainly not to be the case. **While the general population figures are mentioned, the key discussion looks to the relevant labor market, exactly what the Supreme Court has instructed is appropriate.**

App. at 51a. Thus, the Sixth Circuit's mischaracterization of Dr. Bendick's statistical pool further reflects its fatally strict review.

C. The Sixth Circuit Misinterpreted *Croson* By Concluding That A Gross Statistical Disparity Can Never Sustain An Affirmative Action Plan.

The Sixth Circuit stated:

> Thus, as implied by the Supreme Court's holdings in *Croson* and *Adarand*, a plan is constitutionally unsupportable when it is driven at bottom, by nothing but the bare assumption that representation of various groups in specific employment categories should be derived from general proportion, even with whatever "adjustments" the experts, litigants, or courts may think appropriate.

App. 25a. The Sixth Circuit's interpretation of *Croson* cannot be reconciled with this Court's unequivocal ruling in that case:

> There is no doubt that "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute *prima facie* proof of a pattern and practice of discrimination..."

Croson, 488 U.S. at 501 (citing to *Hazelwood School District v. United States*, 433 U.S. 299, 307-308 (1977). This Court further held such *prima facie* proof presents a strong basis in evidence to support a finding of a compelling governmental interest. *Id.*, at 503.

In *Croson*, the City of Richmond's statistical evidence did not support a compelling interest because the city was unable to provide any statistical evidence showing a gross disparity between the expected percentage of minority business enterprises (MBE's) in the industry and the actual percentage in the industry. This was due to the fact that the City of Richmond had no way of calculating the relevant statistical pool because the qualifications for being a contractor were so specialized and difficult to assess. *Croson*, 488 U.S. at 502. As a result, the City of Richmond was forced to rely on general population figures which failed to reflect the pool of qualified persons: those possessing the special skills necessary for participation in the construction industry. *Id.* at 502-503.

This Court's grounds for criticizing the statistical evidence offered in *Croson* are not present in this case. The City of Flint, unlike the City of Richmond, was able to determine how many persons in the relevant market were qualified to be a police officer because the qualifications for such a position were specifically defined: persons over the age of eighteen with a high school diploma.[15]

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[15] The First Circuit, distinguished *Croson* on the same grounds. *Stuart*, 951 F.2d at 450-451.

Dr. Bendick was able to determine that there was a gross disparity between the percentage of minorities in the relevant labor market who were qualified for the position of a police officer and the percentage of minorities that would have been police officers absent discrimination. Using this figure, Dr. Bendick was then able to conclude that 31.1% of the sergeants would have been minority in the absence of discrimination while only 10.1% of sergeants actually were minority. Under *Croson*, this gross statistical disparity between the percentage of expected minority sergeants and the percentage of minorities actually serving as sergeants constitutes evidence of a *prima facie* case of discrimination. Thus, the City produced evidence to support an inference of discrimination.[16]

IV. THE SIXTH CIRCUIT FAILED TO CONFINE ITS REVIEW TO THE DISTRICT COURT'S FINDING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT.

The District Court granted the City's Motion for Summary Judgment, finding that Plaintiffs had failed to offer evidence to create a genuine issue of material fact for trial. On appeal, the Sixth Circuit abandoned the inquiry as to whether there was a genuine issue of material fact for trial and, instead, resolved the issues as a matter of law.

This Court has established that, reviewing the record *de novo*, the question for the court is whether the evidence taken in the light most favorable to the non-moving party raises a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Further, in undertaking this review, the court is not to make credibility

[16] The Sixth Circuit also ignored the District Court's specific finding that "[w]hen combined with the powerful anecdotal accounts of continuing racism in the Department, the statistical evidence provides the 'sufficient basis in evidence' for this Court to find a compelling state interest to adopt the plan." App. 52a.

determinations, weigh the evidence or determine the truth of the matter. *Liberty Lobby*, 477 U.S. at 249, 255. Nor is the plaintiff relieved of his own burden of producing evidence which would support a jury verdict. *Liberty Lobby*, 477 U.S. at 256-257.

Casting aside its role as an appellate court, the Sixth Circuit throughout its opinion raised challenges which were neither brought by Plaintiffs, nor supported by the evidence, in its effort to invalidate the Plan. The Sixth Circuit never even acknowledged the proper standard of review of the District Court's grant of summary judgment.

For example, the Sixth Circuit concluded that Dr. Bendick improperly assumed that minorities are as inclined as non-minorities to seek employment in the Police Department. App. 26a. However, not only did Plaintiffs fail to challenge this assumption, the Sixth Circuit ignored the evidence which would support it. Dr. Bendick's report in fact contained evidence that the percentage of minority applications received when the department had posted openings was 53.1% between 1973 and 1983, which is significantly greater than the proportion he estimated to be the relevant qualified labor pool. This evidence also demonstrated a significant disparity between the number of minority applicants and officers.

The Sixth Circuit also challenged the statistical analysis as being deficient because of the potential effect of the shift in minority population that occurred in the City of Flint and the possible effect of minority turnover rates. App. 26a-27a. However, Plaintiffs never raised this issue, nor is there evidence in the record to support this contention. When the Eleventh Circuit was confronted with similar challenges by the plaintiffs in *Peightal*, the Court held that "mere speculation" regarding the effect of a shift in minority population was insufficient to rebut the defendant's statistical analysis. *Peightal*, 26 F.3d at 1556-1557.

Further, the improper review by the Sixth Circuit is highlighted by its reliance on 1992 statistics to undermine the basis for the City's adoption of the Plan in 1984. In 1992, minorities

constituted 36% of sergeants and 30% of police officers which was, more than seven years after the Plan was adopted. App. 25a.

Other circuits have applied the Supreme Court's approach for reviewing decisions granting summary judgment in cases challenging affirmative action plans as violations of equal protection.[17] For example, the Tenth Circuit held in *Concrete Works of Colorado v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994), *reh. den., cert. den.*; 115 S. Ct. 1315 (1995):

> Ultimately, whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling interest in the municipality to enact a race-conscious ordinance, is a question of law. *Associated Gen. Contractors v. New Haven*, 791 F. Supp. 941, 944 (D. Conn. 1992). Underlying that legal conclusion, however, are **factual determinations** about the accuracy and validity of a municipality's evidentiary support for its program.
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> * * *
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> In addressing this question [of the evidentiary predicate for the ordinance] we are particularly mindful that this appeal comes to us at the summary judgment stage, where the court's task is not to weigh the evidence, but rather to discern whether the "record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita*, 475 U.S. at 587; 106 S. Ct. at 1356.

Id., at 1523 (emphasis added). The Court in *Concrete Works* concluded that the "disputes about the accuracy of Denver's data

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[17] The Sixth Circuit is inconsistent with its own decision in *Aiken*, 37 F.3d 1155, 1167, where the Court concluded that "a genuine issue remains as to whether the promotions were made pursuant to a 'narrowly tailored' remedy," vacated entry of summary judgment for the defendants and remanded the case to the district court "so that it may reexamine its findings on the narrowly tailored issue."

should not be resolved at summary judgment" and remanded the case for trial. *Id.*, at 1529-1531.

Similarly, the Sixth Circuit's reasoning and conclusions are inconsistent with the decision of the Seventh Circuit in *Billish v. City of Chicago*, 989 F.2d 890 (7th Cir. 1993) (*en banc*), which reversed the grant of summary judgment in favor of the defendants in a case challenging an affirmative action policy for the promotion of fire fighters. In that case, the Seventh Circuit rejected the arguments and evidence offered by the City of Chicago to justify the racial preferences in promotions and discussed its concern about the promotion of a possibly unqualified minority. The Seventh Circuit **nonetheless** concluded that the issues could not be resolved on summary judgment without a trial to determine whether the discrimination could survive "strict scrutiny." The Court specifically concluded that evidence regarding the promotion of a minority who had not achieved a passing score created a question of fact for remand. *Id.*, at 894.

In contrast with *Billish*, the Sixth Circuit extrapolated from the testimony of one Plaintiff that 10 points had been added to all scores on the 1987 exam, to broadly conclude that the Plan operated to promote unqualified minority officers. This conclusion ignored the District Court's observation that "[t]here has been no suggestion that the minorities appointed to sergeant were not qualified." App. 54a. Based on its unsubstantiated conclusion, the Sixth Circuit struck down the Plan.

Finally, the Sixth Circuit's clear departure from the proper standard of review is evident in the fundamental inconsistency between its conclusion that "deeper analysis" of the statistical evidence is necessary and its conclusion and adjudication that the City did not have a compelling state interest "as a matter of law."[18]

[18] "We hold that, as a matter of law, the district court erred by adopting, **without deeper analysis**, Dr. Bendick's raw statistics . . ." App. 22a; "Therefore, standing alone **without more serious inquiry** along the lines that we have discussed, Dr. Bendick's assumption . . ." App. 28a. (emphasis added).

Thus, the Sixth Circuit failed to conduct a review of the decision to grant the City's motion for summary judgment in accordance with this Court's articulated standard. In addition, even if there were questions presented by the evidence in the record, the Sixth Circuit's extraordinary decision to effectively enter summary judgment in favor of Plaintiffs is in direct conflict with decisions of other Circuits.

V. THE SIXTH CIRCUIT'S UNJUST RETROACTIVE APPLICATION OF IMPROPERLY HEIGHTENED STRICT SCRUTINY SHOULD BE REVERSED AND/OR THE DECISION'S REACH SHOULD BE MODIFIED.

Straining to find the Plan unconstitutional *ab initio*, the Sixth Circuit unjustly retroactively misapplied this Court's recent pronouncements on voluntary affirmative action to pre-*Croson* conduct consonant with the law at the time of the Plan's adoption.

Given the factual and legal context in which the City adopted the Plan, the decision below should be vacated as manifestly unjust, or, in the alternative, its reach should be modified either by this Court or on remand.

A. Standard At Adoption Of Affirmative Action Plan.

In 1983-1984, when the Plan was considered and adopted, this Court's pronouncements on voluntary affirmative action plans were mixed at best. However, the then Sixth Circuit standard for approving such voluntary plans was clear, and the Plan was adopted to conform to Sixth Circuit precedent.

In its sole employment affirmative action case as of 1984, this Court concluded that a collectively-bargained voluntary affirmative action plan **mandating a 1:1 quota** for minority workers admitted to on-the-job training did not violate Title VII of the Civil Rights Act of 1964. *Steelworkers*, 443 U.S. 193.

The only other precedent from this Court at the time of the adoption of the Plan did not involve a public employer's affirmative action plan, but involved a university admission's program,

University of California Regents v. Bakke, 438 U.S. 265 (1978), and a Congressionally-mandated minority set-aside program granting preferences based on explicit classification by race, *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Both were plurality opinions offering little guidance to lower courts. The lead opinion in *Fullilove* approved an affirmative action plan against constitutional challenge "under either 'test' articulated in the several *Bakke* opinions." *Fullilove,* 448 U.S. at 491-492. In his separate concurrence in *Fullilove*, Justice Powell again reaffirmed his analysis from *Bakke* in the minority set-aside context. In their separate opinion concurring only in the judgment, Justices Marshall, Brennan and Blackmun continued to adhere to the constitutional analysis from Justice Marshall's separate opinion in *Bakke*, 448 U.S. at 417, to the effect that benign racial classifications are not *per se* invalid under the Equal Protection Clause. *Fullilove,* 448 U.S. 519.

In *Bratton*, the Sixth Circuit recognized that this Court's standard of scrutiny for voluntary affirmative action plans was less than clear at the time the Plan was adopted. *Bratton*, 704 F.2d at 885, n. 21. Reviewing the Detroit affirmative action plan upon which the Plan was modeled, the *Bratton* court noted that, in *Bakke* "the Justices have told us mainly that they had agreed to disagree," and that this Court's subsequent decision in *Fullilove* had not significantly clarified the Court's stance on public employer affirmative action plans. *Id.* It further found *Fullilove* a "plurality opinion with little precedential value," and inapposite on its facts. *Id,* at 885, n. 25. Nonetheless, the *Bratton* court noted that the type of "strict scrutiny" analysis in Justice Marshall's concurring opinion in *Fullilove* reaffirmed the Sixth Circuit's earlier analysis in *DPOA v. Young, Id*, at 885-86: an affirmative action plan adopted by a governmental employer could withstand constitutional challenge, and therefore, challenge under § 1983, if a significant governmental interest were served, and if the remedial measures adopted to achieve that governmental interest were reasonable. *Bratton*, 704

F.2d at 883, n. 15 and 886-887. *See also, DPOA v. Young*, 608 F.2d at 694-697.

The *Bratton* court also noted that, even if it were to evaluate the Detroit affirmative action plan upon which the Plan was modeled under "some other, stricter standard," *Id,* at 887. n. 32, it would have found the Detroit plan for promoting sergeants constitutional: "As in *Fullilove*, this program is acceptable under any of the 'formulas of analysis articulated in such cases as *Bakke* (citation omitted),' 448 U.S. at 492, 100 S. Ct. at 2781."

Shortly after the *Bratton* decision, the City and the union agreed to the Addendum containing the promotional ratio. In 1984, the City Council adopted the Plan after public hearings reviewing, *inter alia,* the labor economist's analysis of minority underrepresentation at all levels of the police department, the Flint Equal Employment Opportunity Officer's testimony urging a more accelerated 65/35 promotional ratio than was adopted, and the City Attorney's view that a 1:1 promotional ratio had been approved by the courts. App. 94a and 98a.

Thus, in light of the absence of any clear direction from this Court at the time, the Flint Plan was adopted to conform to clear Sixth Circuit precedent approving the Detroit plan.

B. Precedent After Plan Adoption But Before *Croson*.

In the years following *Croson*, this Court again approved various affirmative action plans but under varying analytical schemes, some suggesting that Title VII, § 1983, and constitutional analyses were, at base, the same. *See, Johnson,* 480 U.S. 616 (plan approved and unilaterally adopted by county to correct past discrimination against women, with Justice O'Connor concurring separately and expressing view that *Weber* and *Wygant* in essence imposed same test for voluntary affirmative action under either Title VII or Equal Protection Clause); *Paradise,* 480 U.S. 149 (1:1 promotional ratio to higher levels of public employment approved premised on a statistical analysis using a qualified minority regional labor pool for

entry level); *Local 93, Int'l Assoc. of Firefighter v. Cleveland,* 478 U.S. 502 (1986) (plan also approved providing for fixed number of promotions and certain promotion goals negotiated into consent decree without ratification by union).

C. The Post-*Croson* Standard.

Five years after the Plan was adopted, this Court invalidated a factually inapposite minority set-aside case of where a city council dominated by African-Americans had relied on generalized assertions of past discrimination in a skilled craft industry.

In *Croson,* it was significant to the theme of "racial politics" in Justice O'Connor's lead opinion that a city council controlled by an African-American majority (**unlike** the Flint City Council) adopted a 30% minority set-aside plan without any findings of identifiable discrimination, and without an appropriate measure of the qualified minority applicant pool. This Court's majority opinion in *Croson* was extremely narrow: four other justices concurred in Parts I, III-B and IV. Part I essentially summarized the facts and proceedings in the case. Part III-B held that Richmond's reliance on past societal discrimination was insufficient to justify a race-based preferential classification under the standard articulated in *Wygant* and rejected the notion that, for jobs requiring special skills, the qualified minority applicant pool was minority representation in the relevant general population. *Croson,* 488 U.S. at 501-502. In Part IV, the majority found it "almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identifiable discrimination in any way." *Id.,* at 507.[19] The factual predicate for each of those holdings is absent here.

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[19] In *Croson,* there was no majority for the propositions set forth in Part III-A of Justice O'Connor's opinion, as the panel below apparently mistakenly believed. Those propositions to which no majority subscribed included: (1) that the Equal Protection Clause required a "searching judicial inquiry into the justification for race-based measures" where there has been a fixed percentage (or quota) because "there is no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact

Since *Croson,* this Court again sent mixed signals about the standard of scrutiny to follow for status-based classifications challenged under the Constitution. It articulated an intermediate means scrutiny test (rather than a strict scrutiny test) for a case involving a federal Fifth Amendment challenge to race-conscious affirmative action adopted by the federal government in *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547 (1990). In doing so, turned its back on *Croson's* explanation that strict scrutiny of governmental racial classifications is essential because the benign nature of classification is not always clear. Five years later, in *Adarand v. Pena,* this Court took yet another tack and reversed *Metro Broadcasting,* reiterating a strict scrutiny standard for affirmative action plans by all governmental actors.

The *Croson* standard should not be retroactively applied to the City's pre-*Croson* Plan to hold a nine-year plan unconstitutional *ab initio,* in light of *Croson's* inapposite facts and this Court's mixed pronouncements before and after *Croson.*

D. The Unjust Retroactive Application Of Heightened Scruinty Should Be Vacated Or Its Reach Modified.

The arbitrary injustice of the Sixth Circuit's *sua sponte* entry of summary judgment against the City, instead of reversing and remanding for trial or for supplemented proofs in light of the changed legal standard, is clearly demonstrated in its inconsistent decision in the case involving the Detroit plan. In *DPOA v. Young,* 989 F.2d 225 (6th Cir. 1993), the Sixth Circuit did not find the Detroit plan unconstitutional *ab initio,* but simply terminated the plan. The Court remanded the case to the district court

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motivated by illegitimate notions of racial inferiority or simply racial politics," *Croson,* 488 U.S. at 493; (2) that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," *id,* at 494; and (3) that, even under a reading of the Equal Protection Clause as proposed by Justice Marshall such that the level of scrutiny would vary according to the ability of different statuses to pursue their interests in the legislative or political process, "heightened scrutiny" would still be appropriate, *id,* at 495-496.

for "a determination of relief, if any, to which plaintiffs, or their counsel, may be entitled." *Id.*, at 228. On remand, the district court held that no such harm had been demonstrated where the last promotions from dual lists had occurred in 1989, and where there were no promotions under the affirmative action plan between the time of the 1989 and 1993 Circuit decisions. *See DPOA v. Young,* 850 F. Supp. 572 (E.D. Mich. 1994). Similarly, in this case, the last promotions from dual lists occurred later in the same year that the District Court approved the Plan under a proper reading of *Croson.*

Therefore, the more appropriate course is to terminate a plan when it has reached an appropriate goal rather than declaring the plan unconstitutional *ab initio,* particularly where the Plan was adopted in good faith reliance on clear Sixth Circuit precedent and in the absence of any controlling, or even easily discernible or predictable, standards of review in this Court. Such a rule may be adopted by this Court here upon plenary consideration of this case, or, upon remand to the Sixth Circuit for reconsideration in light of the *DPOA* case.

Manifest injustice and inequity also results from the Sixth Circuit's misapplication of a heightened scrutiny, under the guise of applying *Croson,* to conduct permissible under clear Sixth Circuit precedent at the time of the Plan's adoption. The crushing costs to state and local governments of such inequitable retroactivity expressly concerned Justices O'Connor, Kennedy, Rehnquist and White in *Harper v. Virginia Dept. of Taxation,* 113 S. Ct. 2510 (1993). This case presents an appropriate factual vehicle under which this Court may reconsider whether the decision in *Harper* was an unwise tack away from the rule on retroactivity announced in 1971 and followed for over two decades.

Initially, it should be noted that three current Justices disagreed with the *Harper* court's brutal disavowal of the Court's well-settled retroactivity rule (*i.e.,* Justices Kennedy, O'Connor, and Rehnquist). Two of the Justices on this Court have not yet

expressed their views as Justices on the issue of retroactivity (*i.e.*, Justices Breyer and Ginsberg).[20] As Justice O'Connor noted in her dissenting opinion in *Harper,* the majority opinion had simply arrived at a rule of retroactivity which overturned settled precedent (*i.e., Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971)), by tallying six votes disagreeing with selective prospectivity from the six opinions in *James B. Beam Distilling Co. v. Georgia,* 110 S. Ct. 2323 (1990). *Harper,* 113 S. Ct. at 2527. Given the disparate treatment of the City of Flint from the City of Detroit by the Sixth Circuit, and given the City's good faith reliance on clear Sixth Circuit precedent in adopting and maintaining its affirmative action plan after full fact-finding, this case would yield a particularly harsh result under the unwise, unnecessary and extreme rule announced in *Harper.*[21] This case presents an appropriate vehicle for a full revisiting of the principles of retroactivity and a reconsideration of the *Harper* rule.

Furthermore, as Justice O'Connor also noted in her *Harper* dissent, neither *Harper* nor any other case of this Court forecloses from this Court the possibility of pure prospectivity. *Harper,* 113 S.Ct. at 2527. Thus, if this Court affirms the Sixth Circuit's new *per se* rule precluding the use of gross statistical disparities, the new burden of proof analysis adopted below and/or the new heightened scrutiny for 1:1 promotional ratios, then this Court is free to, and should, decline to apply the new rule of law to the parties before it and to any other case where the relevant conduct predates its decision, given the enormous potential exposure in class action lawsuits defended by public employers who had in

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[20] In *Reynoldsville Casket Co. v. Hyde,* 115 S. Ct. 1745 (1995), these Justices adhere to the view that the Supremacy Clause bars a state from circumventing an adverse ruling retroactively applied by means of a state tolling statute. Nonetheless, Justice Breyer suggests that there may be limits on retroactivity, as applied. *Id.,* at 1751.

[21] In *Ryder v. U.S.,* 115 S. Ct. 2031, 2036-2037 (1995), Justice Rehnquist, writing for a unanimous court, suggests that there may be some vitality to the question of whether grave disruption or inequity militates against retrospective relief.

good faith (as here) followed clear precedent when adopting voluntary affirmative action plans, and who had (as here) obtained approval of plans from civil rights agencies.

Finally, as Justice Kennedy's concurrence and Justice O'Connor's dissent in *Harper* noted (*Id.*, at 2526 and 2536-2538, respectively), the majority reached the issue of retrospective remedy, which the parties never placed in issue; hence, the *Harper* pronouncements on retroactivity of remedy are mere *dicta*. This case presents an appropriate vehicle for the Court to enunciate a rule under which, if an affirmative action plan voluntarily enacted in good faith reliance on existing law subsequently becomes unconstitutional because of a change in the law, then the remedy will be limited in retroactive effect.

Here, the City argued unsuccessfully below that the district court should grant summary judgment on statute of limitations and/or standing grounds, where the plaintiffs had not sued within three years of adoption of the Plan, and where the plaintiffs asserted denials of promotion which did not occur within three years of the filing of plaintiffs' Complaint (*i.e.*, the appropriate statute of limitations for civil rights claims under Michigan law, and therefore, under § 1983). App. 58a (arguments of the City are incorporated here by reference). Although the Sixth Circuit below acknowledged a split in the circuits on the statute of limitations issue, it nonetheless erroneously affirmed denial of summary judgment. App. 10a-11a, n.4.

Moreover, since this Court for a time repudiated the premise for the *Croson* decision in *Metro Broadcast* and only recently in *Adarand* affirmed a model of constitutional analysis for all governmental actors, the remedy in this case should be curtailed to denials of promotion from dual lists (if any) no earlier than the 1995 *Adarand* decision, or at the very least to denials of promotion from dual lists no earlier than the 1989 *Croson* decision. This Court may grant plenary consideration on the issue of whether, under the equities of this case, some limit on retrospective relief

should apply, or may remand to the trial court for reconsideration of any issues necessary to a determination of the retroactive reach of the decision for remedy purposes.

CONCLUSION

For all of the above reasons, this Court should grant this Petition for Certiorari, and/or vacate the decision of the Sixth Circuit, and: (a) reinstate the District Court's decision; or (b) remand to the District Court for reconsideration on a re-opened record of whether, under the changed legal standard, Plaintiffs can prove the Plan unconstitutional and/or at what point in time any retroactive remedy should arise; or (c) remand to the Sixth Circuit in light of the 1993 *DPOA v. Young* decision.

Respectfully submitted,

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